Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	WC Docket No. 11-59

REPLY COMMENTS OF FAIRFAX COUNTY, VIRGINIA

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SUMMARY

Local communities shape their policies to invite and encourage broadband deployment. Fairfax County's cable franchising and wireless siting policies have resulted in essentially complete broadband coverage. The new regulations championed by the communications industry, on the contrary, have not produced additional deployment. In any case, the Commission lacks authority to interfere in local communities' management of public rights-of-way or wireless siting, or to impose below-market pricing for the benefit of the industry. Siting decisions must be made locally on a case-by-case basis.

The industry's allegations against Fairfax County are incorrect. Contrary to AT&T's claims, the County does not adopt strategies "to delay and thwart applications." Nor does it prepare lists of alternate sites that applicants must consider. AT&T's own applications are frequently incomplete or faulty and cause delays in processing.

PCIA's comments mischaracterize the County's approval process, which implements Virginia Code Ann. § 15.2-2232 (2008). The County notifies an applicant within thirty days if an application is incomplete, but continues to review the information it already has while waiting for the applicant to remedy its errors or omissions. A further streamlined process is already available for minor changes. Most delays in processing wireless applications in Fairfax County are caused by the applicants – in particular, applicants' use of inexperienced consultants and filing of incomplete or erroneous applications. Over the past five years, the Fairfax County Planning Commission has acted favorably on 641 applications for approval of telecommunication uses pursuant to Section 2232; only one application in this time period was denied.

The Commission should reject the industry's requests for additional federal regulation and instead focus on steps that it can lawfully take to promote broadband deployment. The Commission should study the market forces that slow deployment. The Commission should also consider what it may do to help prevent incomplete application filings by providers. The Commission could expand its educational resources to address citizens' frequently expressed concerns about RF emissions. To learn about ways to promote deployment, the Commission should study the enforceable build-out requirements and measurable deployment schedules that localities have established in cable franchise agreements. In addition, the Commission should re-establish the Inter-Governmental Advisory Committee and establish the joint state, local, and tribal task force proposed in the National Broadband Plan.

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Fairfax County, Virginia ("Fairfax County" or "County"), submits the following reply comments in response to the Commission's Notice of Inquiry ("NOI") released April 7, 2011, in the above-captioned proceeding.

I. LOCAL COMMUNITIES WILL CONTINUE TO PROMOTE BROADBAND DEPLOYMENT IF NOT HAMPERED BY FEDERAL REGULATION.

The NOI starts from the premise that local government policies impede broadband deployment, and hence the Commission can expand broadband deployment by "improving" local government policies.[1] The initial round of comments from the communications industry endorsed this point of view, asking the Commission to create new regulations to benefit the industry parties.[2]

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[1] *See* NOI at ¶ 1.

[2] *See, e.g.*, Comments of AT&T at 19-20 (filed July 18, 2011) ("AT&T Comments"); Comments, CTIA—The Wireless Association at 37-40 (filed July 18, 2011) ("CTIA Comments"); Comments of PCIA – The Wireless Infrastructure Association and the DAS Forum

These initial industry comments are mistaken. Local communities want broadband deployment, and the governments that represent those communities shape their policies to invite and encourage such deployment. The Commission should reject the industry's requests for additional federal regulation and instead focus on steps that it can lawfully take to promote broadband deployment.

A. Local Communities Have Long Pursued Policies to Advance Deployment.

Local communities have every reason to support rapid and widespread deployment of broadband services. Individual residents, who elect those governments, are eager to obtain the benefits of these services. Businesses, whose operation and growth are vital to the economic health of the community, need these services.

For many years local governments have therefore taken steps to ensure that advanced communications systems are extended as far as possible throughout the community. For example, Fairfax County's three cable franchises contain provisions requiring wireline providers to build out facilities covering essentially the entire area of the County.[3] As a result, wireline broadband is available almost everywhere in the County, as confirmed by a comprehensive map

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(A Membership Section of PCIA) at 37-57 (filed July 18, 2011) ("PCIA Comments"); Comments of Verizon and Verizon Wireless at 9-11, 32-39 (filed July 18, 2011) ("Verizon Comments").

[3] See A Cable Franchise Agreement Between Fairfax County, Virginia and Media General Cable of Fairfax County, Inc. [later transferred to Cox] at § 4(a); Cable Franchise Agreement by and between Fairfax County, Virginia and Verizon Virginia Inc. at §§ 3.1-3.2; A Cable Franchise Agreement Between Fairfax County, Virginia and Comcast of Virginia, Inc. at § 4(a). All three agreements are available on the County's Web site at http://www.fairfaxcounty.gov/cable/regulation/cable_franchises.htm. Cox's franchise area covers the entire County except for Reston, which is served by Comcast. Verizon's franchise area overlaps the areas served by Cox and Comcast and covers the entire County.

of broadband availability created by the Commonwealth of Virginia.[4] Once Verizon completes its build-out, two competing wireline broadband providers will be available to almost every County resident.

Similarly, the County has approved wireless facilities that provide essentially complete wireless broadband coverage.[5] In reviewing the approval process, a federal district court recognized the County's favorable record in authorizing wireless installations, stating that the County Board of Supervisors "has a record of granting telecommunications facilities siting applications. Specifically, the Board states, and T-Mobile does not dispute, that it has approved over 550 total applications in the past 5 years."[6]

Thus the County's experience, like that of other communities that have filed comments in this proceeding, shows that local governments promote, not resist, deployment.[7]

B. Imposing Regulations to Benefit the Industry Will Not Advance Deployment.

Over the last several years, the communications industry has campaigned for increased regulation in its favor, claiming that imposing new rules on local governments will accelerate broadband deployment. These claims have proved false. For example, cable providers argued

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[4] *See* Virginia Broadband Viewer at http://www.wired.virginia.gov/broadband.shtml. Individually selectable layers show wireline and wireless broadband availability according to the data available.

[5] *Id.*

[6] *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors*, 759 F.Supp.2d 756, 770 (E.D. Va. 2010), *appeal filed, T-Mobile v. Board of Supervisors*, Case No. 11-1060 (4th Cir.).

[7] *See, e.g.*, Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association at 2-3 (filed July 18, 2011) ("NLC Comments").

that the Commission's imposition of a "shot clock" time limit on consideration of new franchise applications would result in greater expansion of cable competition than would occur absent such regulation. The FCC imposed such a rule, but the expected increase in competition did not occur.[8] Wireless providers argued that imposing a similar "shot clock" for their antenna siting applications would greatly accelerate wireless expansion. The FCC imposed such a time limit, but, as the record in this proceeding shows, this did not produce the hoped-for result.[9] Cable providers convinced many states to eliminate or constrain local franchising authority as a way of encouraging competitive entry, yet the promised competitive entry did not occur.[10]

If the industry's theories about local governments were correct, these regulatory actions should have produced significant expansion of broadband deployment. That did not occur. The industry's regulatory initiatives have had many adverse effects,[11] but no detectable positive effects.

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[8] *See, e.g.*, Comments of Anne Arundel and Montgomery Counties, Maryland, and the Cities of Boston, Massachusetts, and Laredo, Texas, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, MB Docket No. 07-269, filed June 8, 2011 ("Comments of Anne Arundel *et al.*").

[9] For example, PCIA, an advocate of the wireless "shot clock" rules, admits that it cannot be determined whether the rules have produced any result whatsoever. PCIA Comments at 12-13. *See also* Comments of Montgomery County, Maryland at 35-39 (filed July 18, 2011) ("Montgomery County Comments"). This time limit is in any case moot in Virginia, where state law already sets a time limit of 90 days for a local community to consider a telecommunications facility application, with a possible extension up to 60 additional days. *See* detailed discussion in section II.B.

[10] *See, e.g.*, NATOA's preliminary study on effects of state franchising, summarized at http://www.natoa.org/2008/03/natoa-survey-impact-of-state-v.html#more; Comments of Anne Arundel *et al.*

[11] *See, e.g.*, Alliance for Communications Democracy, *Analysis of Recent PEG Access Center Closures, Funding Cutbacks and Related Threats, available online at* http://theacd.org/uploaded_docs/2011_PEG_Access_study.pdf (April 8, 2011).

The industry now wants the Commission to create a wide array of additional regulations for their benefit. For example, PCIA wants more onerous shot clock requirements, special privileges for distributed antenna systems (DAS), special treatment for collocation, special rules regarding the use of municipal property for tower siting, novel extensions of Section 253, federal limits on moratoria while local ordinances are being revised, rules preventing localities from considering certain aspects of wireless applications, federal limitations on compensation for private use of local communities' property, and numerous other actions.[12]

While communications industry players frequently state that they are opposed to new regulation, it is clear from the comments in this proceeding that they favor regulation in their own interest. It is doubtful that such new rules will lead to any benefit in terms of deployment. The industry's proposed regulations are, however, likely to reduce jobs and drain resources.[13]

C. Delays Are Typically Caused By Applicants Rather Than Local Governments.

It is not surprising that the industry-sponsored regulations on wireless applications have failed to advance deployment, because they are attempting to fix the wrong part of the system. The bulk of the delays in processing wireless applications in Fairfax County are caused by the applicants, not by the local government.

The amount of time it may take to process a given application cannot be considered in a vacuum. Large wireless applicants file large numbers of applications and expect immediate action on all of them. For example, during a two-month period during the summer of 2011, Fairfax County received five to eight applications each week.[14] Without knowing how many

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[12] *See* PCIA Comments at 37-57.

[13] *See* NLC Comments at 4, 44-46.

[14] Declaration of Chris B. Caperton ("Caperton Declaration") at ¶ 3.

dozens of other applications a local community was trying to move forward at the same time, it is difficult to evaluate a company's claims of outrage about the one particular application it chooses to mention as an illustrative example in its comments.

Moreover, many such applications are not filed by the wireless companies themselves, but by consultants they hire for that purpose. In fact, Fairfax County frequently has to deal with applicants buffered by not one, but two layers of consultants.[15] For example, AT&T retains an engineering company which in turn hires another company to prepare and track a filing. In the County's experience, this third company often lacks an understanding of the technical issues associated with the project, resulting in applications of inconsistent or poor quality. The companies actually preparing the applications frequently appear to be law firms specializing in telecommunications or consulting firms using staff with little training and limited understanding of basic County guidelines and policies.[16]

Under such circumstances it is often difficult for the local government to determine who is in charge or who is the correct person to contact on a given issue so as to move the application forward as quickly as possible. Since turnover appears to be frequent in these consultant positions, County staff must spend time trying to find out who has taken over someone's job and bringing a new company representative up to speed on the issues in the application.[17] The industry's use of intermediaries thus delays the approval process.

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[15] *See also* NLC Comments at 48 n.163. Given the industry's extensive use of consultants to file applications, it is curious that the industry comments devote so much space, and so much rancor, to the fact that local governments, which have much less in-house expertise, occasionally employ consultants. *See, e.g.*, PCIA Comments at 23-26 and Exhibit B, Section V.

[16] Caperton Declaration at ¶¶ 4-5.

[17] Caperton Declaration at ¶ 6.

The single greatest delay factor, in the County's experience, is applicants' willingness to file incomplete or erroneous applications. Applications frequently lack information or contain erroneous or inconsistent information.[18] Valuable time is then wasted trying to fill in the necessary data to allow approval.

The County does its best to prevent application defects from slowing down approvals. The County continues to process the applications, using the information it does have available, while it seeks the missing data. But the County cannot fully overcome the unwillingness of wireless applicants to take the trouble to learn what goes into a complete application or to submit it accurately.

The NOI has thus laid hold of the wrong end of the problem by assuming that the local community is the one at fault if an application moves slowly. Experience shows otherwise.

D. The Commission Lacks Jurisdiction to Interfere In Local Communities' Management of Public Rights-of-Way or Wireless Siting.

Industry commenters argue at length that the Commission can preempt local communities' rights to manage their public rights-of-way and to make decisions regarding wireless zoning and siting.[19] These claims, however, have been refuted by local community filings in the initial round of comments.[20] For example, Section 253 of the Communications Act grants the FCC no authority to address any matter dealing with the right of state and local governments to manage public rights-of-way or to require fair and reasonable compensation for

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[18] Caperton Declaration at ¶ 7. See section II.B for a list of the most common errors the County sees on telecommunications applications.

[19] *See, e.g.*, PCIA Comments at 58-66. *See* NOI at ¶¶ 36, 51-58.

[20] *See, e.g.*, NLC Comments at 52-66.

use of public rights-of-way.[21] Similarly, issues regarding wireless siting under § 332(c)(7) are reserved by Congress for the courts to decide, not the Commission.[22] In both cases, the statutes acknowledge that the resources belonging to local communities serve many purposes, not just those from which the communications industry benefits. The citizens who live in those communities must take into account the use of public rights-of-way for travel, transportation, commerce, water supply, waste disposal, power distribution, and other purposes, and not merely for broadband deployment. The Federal Communications Commission is not in a position to balance these considerations for them.[23]

E. The Commission May Not Impose Below-Market Pricing.

Even if the Commission had authority to set standards for the compensation local communities may receive for the use of their assets by private companies (and, as stated above, it does not), it has no basis for imposing a standard based on costs, or any other below-market price.[24]

The notion of attempting to advance deployment by forcing other parties to subsidize providers through below-market pricing is fundamentally misguided. Asking whether local communities are delaying deployment by charging a fair price for their assets is comparable to

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[21] *See* NLC Comments at 53 *ff*; Frederick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 Seattle U. L. Rev. 475 (2003), *available online at* http://www.millervaneaton.com/pdf_docs/EllrodMillerLawReview.PDF ("*Property Rights*").

[22] *See* NLC Comments at 30, 63 *ff*; Comments of Fairfax County, Virginia In Opposition to Petition for Declaratory Ruling Filed by CTIA, WT Docket No. 08-165 at 6-7, 14-19 (filed Sept. 29, 2008) ("Fairfax County Opposition to CTIA Petition"). As NLC *et al.* note, the question of whether the Commission may regulate wireless siting is currently before the Fifth Circuit. NLC Comments at 52 n.167.

[23] *See* letter comments of the American Public Works Association (July 18, 2011).

[24] *See* NOI ¶ 16.

asking whether the industry is delaying broadband adoption by charging users a "fair price" for service.

Moreover, such a cost-based approach is also inconsistent with the Commission's own practice of holding spectrum auctions, which are designed to elicit a market price for the federal government's assets. If the Commission were serious about the notion that broadband deployment can best be advanced by giving away the necessary assets to the industry at bargain-basement prices, its first move should obviously be to give away for free the spectrum that the FCC itself controls. Yet neither the Commission nor Congress has suggested such a policy. It appears that the notion of giving away someone *else's* property – that of local communities – at below-market prices has a much greater appeal.[25] In any case, the notion that it is for some reason appropriate to limit local communities' compensation to costs has been refuted in the courts and elsewhere.[26]

In addition, there is no reason to suppose that reducing industry players' costs would necessarily result in faster or broader deployment.[27] Giving a communications company an arbitrary reduction in its costs by forcing down the prices at which vendors sell to it merely creates a windfall profit for the communications company, which it may choose to use as it pleases. There are plenty of things companies can do with the money they save, other than spend it on additional deployment. For example, wireless companies can use such funds to buy out competitors and reduce competition. Cable operators can use such funds to buy out content providers and increase vertical integration. They can pay higher dividends to their stockholders,

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[25] A more modest approach to federal subsidy of broadband deployment, if the Commission were to conclude that lack of funding is the key barrier, might be to recommend tax incentives. *See* Section III below.

[26] *See, e.g.*, NLC Comments at 23-24; *Property Rights* at 494-504.

[27] *See, e.g.*, NLC Comments at 45.

increase executive compensation, or further advertise their brands.[28] Thus, when the industry suggests that there is some connection between giving providers minor cost savings and advancing broadband deployment, that is simply a fallacy. There is no such connection.[29]

If the Commission *did* conclude that imposing price limitations on the supplier of an underlying asset were a legitimate means, within its power, of advancing broadband deployment, this would also commit the Commission to imposing cost-of-service regulation on broadband carriers, to promote non-facilities-based competition and wider broadband adoption.

The notion that local communities stand in a position of monopoly power is refuted by NLC *et al.*[30] It neglects the vigorous competition among local communities for business investment and economic development (supported by broadband deployment), as well as the political incentives for local governments provided by citizens' interest in broadband service. It is also inconsistent with the Commission's own position on "effective competition," under which the FCC has for years claimed that satellite transmission is an effective alternative to transmission over the public rights-of-way. And again, this argument, if accepted, would

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[28] The Comcast Center at the University of Maryland "is named for the Comcast Corporation, which purchased a 20-year, $25 million corporate naming agreement." Wikipedia, http://en.wikipedia.org/wiki/Comcast_Center_(arena), viewed 9/15/11.

If the Commission were to adopt the assumption that cost savings automatically advanced deployment, it would follow that the Commission should make regulations preventing providers from spending money on naming stadiums and requiring them to spend those sums on deployment instead. The absurdity of such a notion highlights the equal absurdity of the industry's argument that the FCC should be able to control local communities' use of *their* assets, such as public rights-of-way.

[29] Nor is such an argument sound economics. "Charging fees less than the value granted to the right-of-way user sends the signal that the resource is worth less than its true value. This will lead both to inefficient use of the rights-of-way and to a subsidy to the user . . ." NLC Comments at 40.

[30] NLC Comments at 15-16.

implicate the Commission in questions of the right of access to carriers' networks, which *do* have quasi-monopoly characteristics.[31]

F. Siting Decisions Must Be Made On a Case-By-Case Basis.

Each community's circumstances, and the impacts of each application, are different. Thus, no single Washington-based rule can take the place of local communities' decision-making authority on tower siting and right-of-way applications.

This point is illustrated by the series of photographs on page 46 of the NLC Comments. In that case, even subsequent additions to a single monopole had visibly different effects. Local zoning authorities' decision on the first application might well have been different from their decision on the last – because conditions had changed and the results would be different. Lumping together any possible changes to an existing tower as "colocation" and treating them as trivial would sweep under the rug a wide range of issues, including the cumulative effects of weight loading, wind loading, visual impact, base station equipment, and power requirements.

In addition to requesting regulation by the Commission, industry comments endorse legislative language currently before Congress, Section 528 of S. 911, that would similarly preempt local authority over certain telecommunications facilities on the assumption that colocation can be treated as trivial. The County opposes such a provision.[32]

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[31] For example, Level 3 points out in its dispute over peering prices that Comcast exercises monopoly power. Todd Spangler, *Comcast, Level 3 Still At Impasse Over Internet Connection Fees*, Multichannel News, July 27, 2011, *available online at* http://www.multichannel.com/article/471614-Comcast_Level_3_Still_At_Impasse_Over_Internet_Connection_Fees.php (quoting Level 3 CEO Jim Crowe).

[32] *See* Letter from Sharon Bulova to Mark Warner dated June 21, 2011, appended as Attachment 2. For industry comments, *see* Comments of Verizon and Verizon Wireless at 11; PCIA Comments at 37-38; CTIA Comments at 34.

II. INDUSTRY ALLEGATIONS AGAINST FAIRFAX COUNTY ARE INACCURATE AND MISREPRESENT THE FACTS.

Companies filing pro-regulation comments in the initial round of this proceeding made many claims that local communities were obstructing their tower applications.[33] Two claims made in the initial comments refer specifically to Fairfax County.

A. AT&T's Statements Regarding the County's Approval Process Are Incorrect.

In its initial comments, AT&T objects to the practice of communities in the Washington, D.C./Baltimore area of fully informing applicants in advance about what information must be submitted to constitute a complete application, including what sort of alternative sites must be considered. AT&T refers to such clear explanations of application requirements as "time-consuming pre-application requirements" and considers them an attempt to "evade," rather than to implement, the Commission's shot clock regulations.[34] In a footnote, AT&T states:

> For example, in Fairfax County, Virginia, AT&T is seeking to add nearly 30 new sites. But the city [*sic*] of Fairfax has stated that it does not want any more cell sites, and one of the main strategies it uses to delay and thwart applications is to provide applicants with a long list of alternative sites and requiring proof as to why each of those sites is not a valid alternative. To make matters worse, these lists almost always contain elementary school properties, and these school officials have repeatedly told AT&T that they will not permit a cell site to be place [*sic*] on school property. AT&T has informed Fairfax County of this but elementary schools remain on the list.[35]

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[33] As of this writing, many targeted communities have already filed refutations of the allegations made by the industry commenters.

[34] AT&T Comments at 15.

[35] AT&T Comments at 15 n.21. The second sentence refers to "the *city* of Fairfax" (emphasis added) rather than to Fairfax County. This discussion will assume that AT&T's reference to the City of Fairfax, a separate and independent incorporated municipality with its own governing body that is surrounded by Fairfax County, simply represents a careless error of the same sort commonly encountered in AT&T's wireless siting applications, and that AT&T intended to refer to Fairfax County throughout this passage.

The County does not adopt strategies "to delay and thwart applications." This unsupported claim about the County's intent or motives is false. Nor has the County ever stated that it "does not want any more cell sites," a notion for which AT&T provides neither citation nor evidence.[36]

AT&T's claims regarding alternative sites are also inaccurate. The County does not prepare lists of alternate sites that applicants must consider for telecommunication facilities. Rather, the application form provides a space for the applicant to identify alternative locations and to describe the constraints of those locations. Fairfax County does allow telecommunication facilities to be sited on school properties, and the Fairfax County Public School System has approved facilities on middle and high school properties. Elementary schools, on the other hand, by County planning policy are typically located on relatively small parcels in established residential neighborhoods. Telecommunication towers and poles on elementary school properties would generally be out of character with the adjacent residential land uses. For this reason there is generally no need for applicants to include elementary school sites among the alternative locations. Such sites have, however, been approved at times: Fairfax County has approved telecommunication facilities at two elementary schools as well as fifteen high schools and three middle schools.[37] Thus, the AT&T Comments completely misrepresent the County's approval process.

If AT&T's numerous applications in Fairfax County have encountered processing difficulties, the real cause is AT&T itself. For example, for the week ending August 12, 2011, thirteen incomplete or faulty applications had to be returned to the applicants for correction.

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[36] Caperton Declaration at ¶ 8.

[37] Caperton Declaration at ¶¶ 9-11.

Seven of these – over half – had been submitted by AT&T.[38] It is AT&T's own lack of competence or due care, as with other applicants, that slows down the approval process.[39]

B. PCIA Mischaracterizes the County's Approval Process.

PCIA criticizes the County's approval process by including Fairfax County in a list of communities with alleged "Right of Way Issues" in its Exhibit B, Section III, p. 9.

Fairfax Co.	VA	Fairfax County Code § 2232	DAS attachments require full hearing.

PCIA provides no further details as to why it finds the County's approval process objectionable. A more complete account of that process, however, makes clear that PCIA's criticism is baseless.

The Section 2232 process does not refer to a "Fairfax County Code § 2232," as PCIA supposes. Rather, it refers to a process implemented by the County pursuant to Virginia Code Ann. § 15.2-2232 (2008). Over the past five years, most telecommunications facility siting applications in Fairfax County have been subject only to this streamlined process. Virginia Code Ann. § 15.2-2232 requires each locality to adopt a comprehensive plan. Upon adoption, the comprehensive plan controls the general or approximate location, character, and extent of each feature shown on the plan, including personal wireless service facilities. Any person proposing a new feature that is not already shown on the comprehensive plan must submit the feature to the local planning commission, so that the local planning commission can determine whether the feature's proposed location is substantially in accord with the plan.[40]

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[38] Caperton Declaration at ¶ 12.

[39] In addition, as stated above, AT&T is one of the telecommunications companies that complicates the approval process by using multiple consultants to file its applications. *See* n.16 and accompanying text.

[40] Va. Code Ann. § 15.2-2232(A).

Va. Code Ann. § 15.2-2232 imposes strict and expedited time limits on the planning commission's processing of applications for telecommunications facilities, making an additional tier of federal regulation unnecessary. Va. Code Ann. § 15.2-2232(F)[41] explicitly provides that the local planning commission must act upon a 2232 application for a telecommunications facility within 90 days after an application is submitted, unless the applicant agrees to an extension of time or the local governing body authorizes an extension of time, but any such extension may not exceed a period of 60 additional days. If a planning commission fails to act within these time limits, Va. Code Ann. § 15.2-2232(F) states that the application is deemed approved by the local planning commission.[42]

The regular approval process commences with the filing of an application with the Fairfax County Department of Planning and Zoning. County staff reviews the application, assists the applicant in providing the information necessary to process the application, and coordinates with the applicant in an effort to ensure that the application complies with all laws and regulatory requirements. The County notifies an applicant within thirty days if the application is incomplete, but nonetheless continues to review the information it already has, so as to advance the process as much as possible while waiting for the applicant to make good its errors or omissions.

In cases involving new towers and monopoles in particular, significant County staff time is required to review applicable zoning requirements, review site alternatives, and study the potential impacts of such facilities. Allowing an opportunity for the community to participate in this study requires advance public notice. After investigation, staff issues a report containing

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[41] Subsection F of Va. Code Ann. § 15.2-2232 was added by the Virginia General Assembly in 1998. 1998 Acts of Assembly, Chapter 683.

[42] For further details *see* Fairfax County Opposition to CTIA Petition at 7-14.

background information and recommendations concerning the application, ensures that the public notice and advertising requirements for any required public hearing on the application are met, and assists the Planning Commission in the hearing on the application.

There is, however, a further streamlined process already available for minor changes, such as those for which PCIA wishes expedited consideration. "Low impact" sites that conform to existing zoning regulations, and can include facilities to be located on existing buildings, communication towers, and monopoles, are not subject to a public hearing process before the Planning Commission. Instead, the application is placed on the Planning Commission's agenda simply to affirm that the proposed facility should be considered as a "feature shown" on the Comprehensive Plan. Applications for features that are *not* already shown on the adopted Comprehensive Plan, typically new monopoles and towers, require a public hearing before the Planning Commission under state law.[43]

Over the past five years, the Fairfax County Planning Commission has acted favorably on 641 applications for approval of telecommunication uses pursuant to Va. Code Ann. § 15.2-2232. Only one application in this time period was denied by the Planning Commission.[44]

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[43] *See* Va. Code Ann. § 15.2-2232(A). In such cases, Va. Code Ann. § 15.2-2204 requires advertisement of the public hearing at least once a week for two successive weeks in a newspaper of local circulation, and such advertisements may occur not less than 5 days nor more than 21 days before the public hearing on the application. Because of the advertisement requirements, a 2232 application requiring a public hearing is generally scheduled for hearing before the Planning Commission on the outer limits of the 90-day deadline provided by Va. Code Ann. § 15.2-2232(F), and the time allotted to staff to process such applications is already compressed to the maximum degree possible.

The Section 2232 process in the County is summarized in *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors*, 759 F.Supp.2d at 758 n.1, 759 n.7, 760 n.8 (E.D. Va. 2010).

[44] Caperton Declaration at ¶ 13.

For the period June 2010 – July 2011, the average processing time for an application classified as a Feature Shown of the Comprehensive Plan was 61 days. 119 of the 172 applications were processed as "features shown" and did not require public hearings.[45]

In the past five years, a relatively small number of telecommunications facility siting applications in Fairfax County have been subject to a second land use approval process: a special exception application. Special exception approval is required for a wide variety of land uses in Fairfax County, including heavy industrial uses, high-intensity commercial uses such as service stations and convenience stores, and other uses that "by their nature or design can have an undue impact upon or be incompatible with other uses of land."[46] In accord with the intent of § 332(c)(7), telecommunications facilities are not treated any differently than other special-impact uses.[47]

With the exception of cellular towers,[48] telecommunications facilities are allowed by right in Fairfax County in all commercial and industrial districts, in any zoning district within a utility transmission easement of 90 feet or more, and on all real property zoned to public use. A special exception is generally required only for the establishment of such facilities in residential

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[45] Caperton Declaration at ¶ 14.

[46] *See* The Zoning Ordinance for the County of Fairfax, Virginia ("Zoning Ordinance") § 9-001; www.fairfaxcounty.gov/zoning.

[47] *See* H.R. Conf. Rep. No.104-458, at 208 ("If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames on a case-by-case basis").

[48] Cellular towers are allowed by right in Fairfax County in all industrial zoning districts and by special exception in all other zoning districts. *Id.*

districts.[49] The special exception approval process also allows the County to take into account any existing environmental constraints on the proposed site (including its delineation as a floodplain or resource protection area) and to mitigate the impacts of the proposed telecommunications facility in light of these environmental constraints.

Fairfax County finds that the processing time for telecommunications facility applications varies based on the quality and completeness of the application submitted. The following are examples of the types of errors most commonly seen on applications.[50]

1. Application for the wrong type of approval. An applicant requests that an application be reviewed as a "feature shown" of the Comprehensive Plan when the proposed facility is not a "feature shown." In such instances the application also is missing planning, zoning, and technical information necessary for the 2232 public hearing.

2. Missing information. The applicant uses the proper application but does not include or verify the street address, parcel number, parcel area, applicable zoning requirements, or related approved applications for the property.

3. Engineering errors. Technical information and engineering drawings are incomplete or missing.

4. Application not "proofed." Applications not proof-read are evidenced by inconsistent information on the form. For example, the statement of justification and the attachments do not match the technical aspects of the proposal as presented in the engineering documents.

5. Application resubmission errors. Due to lack of adequate applicant review, resubmissions of erroneous applications often perpetuate earlier errors already identified, resulting in further delays.

6. Agent turnover. Turnover among applicants' agents makes coordination difficult. Often County staff does not receive notice and/or alternate contacts for the application.

7. Lingering applications. Applications that require modifications can often linger for months with no coordination activity by the applicant to advance the application.

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[49] *See* Zoning Ordinance § 2-514. Under limited circumstances, antennas may also be established by right in residential districts.

[50] Caperton Declaration at ¶¶ 15-16.

Some applications filed with the County consist of only partially formulated or purely conceptual plans. Understandably, such applications change as the applicant refines its plans and/or coordinates the application with staff or based on input received from the community. On other occasions, after filing an application, the applicant may simply wish to modify the size and location of antennas or equipment, or to allow additional carriers on the same structure. Such changes and revisions may delay the approval process, but this is not the County's fault and cannot be remedied by increased federal regulation of County zoning practices.

In particular, the County finds that DAS applications are not as trivial as PCIA wishes the Commission to believe. In an application involving a number of antennas, most may be unobtrusive, but some may pose serious problems.[51] Thus, blanket approval of a DAS application cannot be granted without looking at the facts of each individual case.

PCIA's adverse mention of the County's approval process fails to show that any inappropriate delay was caused by the County or could be remedied by a new round of federal regulation.

III. THE FCC CAN TAKE STEPS TO IMPROVE BROADBAND DEPLOYMENT.

The fundamental problem is not local regulation, but lack of broadband deployment. Rather than beginning with the false assumption that local approval processes are hindering deployment, the Commission should start with an open-minded inquiry as to what *is* slowing deployment. The following recommendations suggest steps the Commission may be able to take to promote broadband deployment.

The Commission should study the *market forces* that slow deployment – the reasons carriers choose not to build in unserved or underserved areas, the costs of service, the use of

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[51] Caperton Declaration at ¶ 17.

revenues for activities that do not result in deployment – and what regulatory and economic incentives could be used to mitigate these forces. As NLC *et al.* have pointed out, minimizing regulation does not in fact produce more widespread deployment of broadband service.[52] The Commission should seek to identify what factors *do* correlate with improved deployment. Geophysical barriers to construction, for example, or demographics leading to better rate-of-return, may make a better statistical fit with providers' observed failure to build. In particular, it may be useful for the Commission to study how deployment is working in countries that have faster, cheaper broadband service than the United States.

The Commission should also look at what it may be able to do to help prevent incomplete application filings by providers. Montgomery County has noted that experienced contractors do better in this respect.[53] It may be that educational efforts for applicants by the Commission could reduce incomplete or erroneous applications and thus reduce applicant-created delays. Similarly, the Commission could require the service provider (not a third-party agent or consultant) to provide full information for a primary point of contact authorized to make decisions and provide information about an application, along with a backup person if the primary is not available or leaves the company. Communications companies may be more attentive to federal rules in this respect than to local requirements.

If the Commission believes it would be useful to catalogue best practices in this area, it may wish to provide funding for the national experts in local government practices – organizations such as the National Association of Counties, the National League of Cities, and the National Association of Telecommunications Officers and Advisors – to conduct a thorough study of such practices and report back to the Commission.

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[52] NLC Comments at 8-16.

[53] Montgomery County Comments at 20-21.

NLC *et al.* note that the Commission bears sole responsibility for dealing with the effects of RF emissions, but that issues relating to such emissions are regularly raised before local officials in local proceedings.[54] The Commission could expand its educational resources in this area to address citizens' frequently expressed concerns.

To learn about ways to promote deployment, the Commission should study the enforceable build-out requirements and measurable deployment schedules that localities have established in cable franchise agreements. One lesson that should be taken from this body of experience is that no concessions should be made to providers without specific, measurable commitments in return – a lesson that should have been learned long ago. It is significant that none of the industry filings in this proceeding offers a commitment that if X is done, the commenter *will* increase deployment in a given way.[55] Such a commitment should be an essential part of any incentive provided by the Commission. Responsible steps to achieve broadband deployment must include accountability and verifiability; any benefits granted must be conditioned on showing that the desired results have been obtained.

If the Commission were to conclude that reducing providers' costs is in fact the best way to advance deployment, it should recommend that Congress provide such subsidies, perhaps in the form of tax incentives. Given the point just made, however, any such subsidies should be provided only for *proven* deployment, after the fact. As an alternative to tax breaks, the Commission might reduce its spectrum auction prices based on proven build-out achievements,

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[54] NLC Comments at 50-51.

[55] Such commitments must be enforceable. *See, e.g.*, David Rosen and Bruce Kushnick, *How the Phone Companies Are Screwing America: The $320 Billion Broadband Rip-Off* (Oct. 7, 2010) (*available online at* http://www.alternet.org/story/148397/how_the_phone_companies_are_screwing_america:_the_$320_billion_broadband_rip-off?page=entire); Judith Davidoff, *Critics warn that AT&T has history of spinning optic fables* (Oct. 31, 2007), *available online at* http://host.madison.com/ct/business/article_33706bb8-5b2d-11e0-9afd-001cc4c03286.html)

or on a specified increase in the number of U.S. residents with access to broadband, or a specified increase in average actual broadband speeds nationwide.

The NOI notes that the carriers themselves control "private rights-of-way."[56] The Commission may wish to consider what rules should govern *these* resources, in addition to the pole attachment rules it has recently updated.

Finally, the Commission should re-establish the Inter-Governmental Advisory Committee and establish the joint state, local, and tribal task force proposed in the National Broadband Plan.[57] These groups would provide much-needed counterpoint to the industry representatives on whom the Commission relied in constructing the NOI.[58]

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[56] NOI at ¶ 3 n.5.

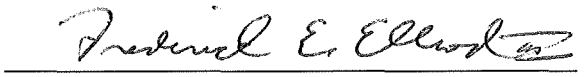
[57] Federal Communications Commission, *Connecting America: The National Broadband Plan* at 113, Recommendation 6.6 (2010). *See* NLC Comments at 49.

[58] *See* NOI at ¶ 8 n.26.

IV. CONCLUSION

For the reasons indicated above, the Bureau should disregard the incorrect allegations made by industry commenters, decline their requests to impose new federal regulations on local communities, and seek to determine the real causes of delays in broadband deployment.

Respectfully submitted,



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September 30, 2011

ATTACHMENT 1

Declaration of Chris B. Caperton

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	WC Docket No. 11-59

DECLARATION OF CHRIS B. CAPERTON

I, Chris B. Caperton, declare as follows:

1. My name is Chris B. Caperton. My business address is 12055 Government Center Parkway, 7th Floor, Fairfax, VA 22035. I am the Chief of the Public Facilities Branch in the Planning Division's Department of Planning and Zoning (DPZ) of Fairfax County, Virginia.

2. I was hired as the Fairfax County Laurel Hill Project Coordinator by Fairfax County ("the County") in June 2005. I became the Chief of the Public Facilities Branch in February 2011. The Public Facilities Branch deals with wireless siting applications to the County.

3. Over a two-month period during the summer of 2011, the County typically received five to eight wireless siting applications each week.

4. Many wireless siting applications in the County are not filed by the wireless companies themselves, but by consultants they hire for that purpose. In some cases, more than

one consultant is involved in an application. For example, in at least one case AT&T retained an engineering company which in turn hired a third party to prepare and track a filing.

5. Such secondary and tertiary consultants often lack an understanding of the technical issues associated with the project, resulting in applications of inconsistent or poor quality. The companies actually preparing the applications frequently appear to be law firms specializing in telecommunications or consulting firms using staff with little training or understanding of basic County guidelines and policies.

6. Due to applicants' use of consultants, it is often difficult for the County to determine the responsible party or the correct contact person to answer questions about an application and ensure its timely processing. Since turnover appears to be frequent in these positions, County staff often spend time tracking down contacts and educating new people on the requirements of the application.

7. The single greatest delay factor in the County's experience is applicants' filing of incomplete or erroneous applications.

8. The County does not seek to delay or thwart applications. To the best of my knowledge, the County has not stated that it does not want any more cell sites.

9. The County does not prepare lists of alternate sites that applicants must consider for telecommunication facilities. Rather, the application form provides a space for the applicant to identify alternative locations and to describe the constraints of those locations.

10. The County allows telecommunication facilities to be sited on school properties. The Fairfax County Public School System has approved facilities on middle and high school properties. Elementary schools, on the other hand, by County planning policy are typically located on relatively small parcels in established residential neighborhoods. Telecommunication towers and poles on elementary school properties would generally be out of character with the

adjacent residential land uses. For this reason there is generally no need for applicants to include elementary school sites among the alternative locations.

11. The County has approved telecommunication facilities at twenty grade schools in the County: fifteen high schools, three middle schools and two elementary schools.

12. During the week ending August 12, 2011, thirteen incomplete or faulty applications had to be returned by the County to the applicants for correction. Seven of these had been submitted by AT&T.

13. Over the past five years, the Fairfax County Planning Commission has acted favorably on 641 applications for approval of telecommunication uses pursuant to Va. Code Ann. § 15.2-2232. Only one application in this time period was denied by the Planning Commission.

14. For the period June 2010 through July 2011, the average processing time for an application classified as a Feature Shown of the Comprehensive Plan was 61 days. 119 of the 172 applications were features shown and did not require public hearings.

15. The processing time for telecommunications facility applications varies based on the quality of the application submitted.

16. The types of errors most commonly seen on such applications include:

A. Application for the wrong type of approval. An applicant requests that an application be reviewed as a "feature shown" of the Comprehensive Plan when the proposed facility is not a "feature shown." In these instances the application is also missing planning, zoning, and technical information necessary for the 2232 public hearing.

B. Missing information. Applicant uses the proper application but does not include or verify the street address, parcel number, parcel area, applicable zoning requirements, or related approved applications for the property.

C. Engineering errors. Technical information and engineering drawings are incomplete or missing.

D. Application not "proofed." Applications not proof-read are evidenced by inconsistent information on the form. For example, the statement of justification and the attachments do not match the technical aspects of the proposal as presented in the engineering documents.

E. Application resubmission errors. Due to lack of adequate applicant review, resubmissions of erroneous applications often perpetuate earlier errors already identified, resulting in further delays.

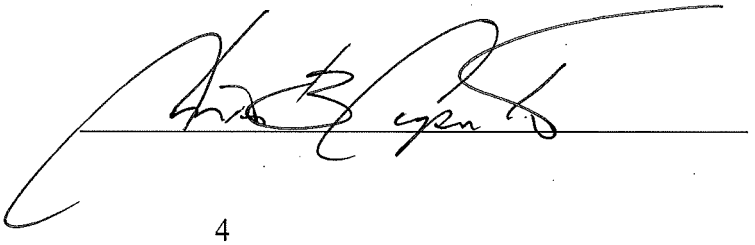
F. Agent turnover. Turnover among applicants' agents makes coordination difficult. Often County staff does not receive notice and/or alternate contacts for the application.

G. Lingering applications. Applications that require modifications can often linger for months with no coordination activity by the applicant to advance the application.

17. In a distributed antenna system (DAS) application involving a number of antennas, most may be unobtrusive, but some may pose serious problems.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on September 30, 2011, at Fairfax County, Virginia.

Dated: September 30, 2011



ATTACHMENT 2

Letter from Sharon Bulova to Mark Warner dated June 21, 2011, re S. 911

COMMONWEALTH OF VIRGINIA
County of Fairfax
BOARD OF SUPERVISORS

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chairman@fairfaxcounty.gov

SHARON BULOVA
CHAIRMAN

June 21, 2011

The Honorable Mark Warner
United States Senate
SR-459A Russell Senate Office Building
Washington, D.C. 20510-4605

Dear Senator Warner:

On behalf of the Fairfax County Board of Supervisors, I am writing to you about an issue of great importance to the County – S. 911, the Public Safety Spectrum and Wireless Innovation Act.

As you know, this legislation would deploy a nationwide, interoperable broadband network for first responders, one of the last major recommendations of the 9/11 Commission. There is much in this bill that would be helpful to the County's public safety agencies, and the Board has been on record in support of allocating an additional portion of the spectrum for public in order to build a nationwide broadband network. This would assist in the County's efforts to achieve interoperability for our first responders.

However, one particular provision in the bill is of concern to the County. Section 528 of the bill essentially says that state and local governments must approve any eligible facilities request for a modification of an existing wireless tower that does not substantially change the physical dimensions of the tower. An "eligible facilities request" would include proposals to collocate new transmission equipment on an existing wireless tower. Such a change would be a significant deviation from the careful balance between the exercise of local zoning authority and federal oversight in current federal law, included in the Telecommunications Act of 1996. That law explicitly preserved local zoning authority over telecommunications facilities, while providing for federal court review to ensure that the exercise of local zoning authority: is supported by substantial evidence; does not have the effect of prohibiting personal wireless service; and does not discriminate among service providers. Local governments believe that the new language in S. 911 would eliminate a portion of our traditional zoning authority and negate federal court review of the exercise of that authority in a manner that is at odds with the Telecommunications Act.

Additionally, the language in S. 911 does not define the phrase "substantially change the physical dimensions of the tower." In a Fairfax County case currently before the U.S. Court of Appeals for the Fourth Circuit, *T-Mobile Northeast, LLC v. Board of Supervisors,* T-Mobile argued that a 10-foot increase in the height of an existing 100-foot transmission pole was a collocation and did not result in any substantial change to the existing pole. The U.S. District Court for the Eastern District of Virginia found that the Board of Supervisors justifiably denied this zoning application because the pole at issue was located in the midst of established

neighborhoods on a scenic byway, and that a 10-foot increase in height would result in the transmission pole towering over the tree canopy, rather than blending into it in the manner called for by the County's Comprehensive Plan. S. 911, as currently written, could be construed as abolishing local government's authority to make these types of fact-specific determinations in the interests of the County's residents.

Finally, the justification for this preemption of local land use authority in S. 911 remains unclear. In Fairfax County, we have a strong record of approving zoning applications for wireless service facilities, as the U.S. District Court noted in the above-referenced case. In a five year period, the County approved over 550 such applications. Further, such decisions are rendered on an expedited basis under the Code of Virginia, which requires a decision on telecommunications facility zoning applications within 90 days, unless the time is extended by the governing body for a period of no more than 60 days. The exercise of local zoning authority over these types of facilities is, quite simply, working well in Fairfax County and elsewhere in the country. The wireless industry has not shown that local zoning authority is being abused, and as a result, there is no reason to enact the language in Section 528. Additionally, it is the County's ability to address constituent concerns over these types of siting issues that is at the heart of our interest in removing such a provision from S. 911.

Please feel free to contact me or have your staff contact Claudia Arko, Legislative Liaison, at (703) 324-2647, or Beth Teare, Senior Assistant County Attorney, at (703) 324-2421 if you have questions or need additional information about the County's concerns and the potential local land use implications of these provisions. I look forward to working with you as this bill goes through the legislative process. Thank you for your time and attention to these critical matters.

Sincerely,

Sharon Bulova
Chairman, Fairfax County Board of Supervisors

cc: The Honorable James H. Webb, United States Senate
The Honorable James P. Moran, United States House of Representatives
The Honorable Frank R. Wolf, United States House of Representatives
The Honorable Gerald E. Connolly, United States House of Representatives
Members, Fairfax County Board of Supervisors
Anthony H. Griffin, County Executive
David P. Bobzien, County Attorney
Susan E. Mittereder, Legislative Director
Claudia Arko, Legislative Liaison
Beth Teare, Senior Assistant County Attorney